SUPREME COURT, U. S.

FILED

JUN 13 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted] 1969

No. [redacted]...

237

BISHOP COLLINS,
Petitioner,

v.

STATE OF WASHINGTON.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN CAUGHLAN
Attorney for Petitioner
IRVING C. PAUL
ROGER W. JOHNSON
Of Counsel

Office and Post Office Address:
620 Arctic Building
Seattle, Washington 98104

METROPOLITAN PRESS [redacted] SEATTLE, WASH.

SUBJECT INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
How the Federal Question Was Presented Below	5
Reasons for Granting the Writ	6
Conclusion	7
Appendices:	
Appendix A	A-1
Appendix B	A-6
Appendix C	A-8
Appendix D	A-9
Appendix E	A-10
Appendix F	A-12

TABLES OF AUTHORITY

Table of Cases

Anders v. California, 386 U.S. 738	6, 7
Entsminger v. Iowa, 386 U.S. 748	6, 7
Escobedo v. Illinois, 378 U.S. 478	6
Gideon v. Wainwright, 372 U.S. 335	6
Kostep v. Fleming, 17 Wn.2d 500, 136 P.2d 449	5
Mathison v. Anderson, 107 Wash. 617, 182 Pac. 622	5
Mempa v. Rhay, 389 U.S. 128	6
Miranda v. Arizona, 384 U.S. 436	6
State ex rel. Phoenix Etc. Ins. Co. v. Superior Court, 146 Wash. 679, 264 Pac. 988	5

Constitutional Provisions

Page

United States Constitution, Sixth Amendment 3, 6

United States Constitution, Fourteenth Amendment, Section 1 ..... 3, 6

Statutes

28 U.S.C., 1257(3) 2

Other Authority

Rules on Appeal, Rule 50 ..... 2, 6

IN THE

Supreme Court of the United States

October Term, 1968

No. .....

BISHOP COLLINS,
Petitioner,

v.

STATE OF WASHINGTON.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BISHOP COLLINS, Petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Washington, entered in the above entitled case on March 14, 1969. R.0091.[1]

CITATIONS TO OPINIONS BELOW

The judgment to which this petition is directed was entered without opinion on March 14, 1969, denying petitioner's motion to recall the remittitur entered on the

1. References are to the pagination of the typewritten record certified by the court below.

opinion of the court dated December 14, 1967. R.0091. The 1967 opinion, R.0063 to 0068, is reported at 72 Wn.2d 741, 435 P.2d 538, and is set forth in full at appendix pages A-1 to A-5 below. The order of the trial court which was reversed and set aside by the 1967 opinion is unreported. R.0004 to 0005. It is set forth in full at appendix pages A-6 to A-7 below.

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on March 14, 1969. R.0091. A timely motion for rehearing was filed on April 7, 1969 R.0092 to 0095, but it was not acted upon by the court because it was directed to an order and not an opinion. There is no provision for rehearing under these circumstances. Rule 50, Rules on Appeal, Washington Court Rules.

The jurisdiction of this court is invoked under 28 U.S.C., 1257 (3), in that a right and privilege of petitioner is specially set up and claimed under the Constitution of the United States.

QUESTION PRESENTED

Whether an indigent defendant in a criminal case for whom counsel has been appointed to protect his interest on appeal of the state from a trial court order setting aside a jury verdict of guilty and granting him a new trial is deprived of his constitutional right to assistance of counsel, when the appointed counsel is allowed to withdraw without filing any brief or making any argument in support of the trial court's decision and order.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Sixth Amendment provision for the right of counsel as applied to the states in Section 1 of the Fourteenth Amendment as follows:

1. Sixth Amendment (in part):

> In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense.

2. Fourteenth Amendment, Section 1 (in part):

> . . . No State shall deprive any person of life, liberty, or property. without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 22, 1966, the petitioner was charged in the Superior Court of the State of Washington by information with two counts of second degree burglary. R.0040 to 0041. He was tried by jury and convicted on one count. The other count was dismissed.

His attorney then moved for a new trial, R.0096, and the trial court granted the motion on the ground that the court had erred in failing to give an instruction proposed by petitioner and because substantial justice was not done in the trial, in that the verdict was not supported by the evidence or by reasonable inferences therefrom. R.0004 to 0005; appendix pages A-6 to A-7 below. It was from this order setting aside the verdict of guilty that the state appealed.

Petitioner at this time was indigent and an attorney

was appointed to represent him on the state's appeal. R.0097; appendix page A-8 below. This appointed attorney did not file a brief or argue the case before the Supreme Court. He explained in a telephone call to the clerk of the Supreme Court, that he was withdrawing because he had been unable to contact his client, the petitioner. The clerk apparently conveyed this information to the Chief Justice and wrote to the attorney on October 23, 1967, that the Chief Justice had approved his withdrawal from the case *on condition that the attorney file an affidavit in the court stating that he had made diligent effort to locate his client and had been unable to do so.* R.0076a; appendix, page A-9 below. This condition was not complied with *until February* 21, 1969, sixteen months later. R.0077-0078; appendix, pages A-10 and A-11 below. Moreover, the affidavit even when belatedly filed did not comply with the court's directions concerning diligent inquiry as to the whereabouts of petitioner. cf. Appendix D, second paragraph, page A-9, below, with Appendix E, second paragraph, page A-10, below.

On December 14, 1967, fourteen months before this affidavit was filed, the court ruled on the appeal, setting aside the order granting the petitioner's new trial without ever receiving a brief or hearing an argument on behalf of petitioner. R.0063-0068. Appendix, pages A-1 to A-5, below.

The order granting a new trial was reversed and the case remanded to the trial court on January 15, 1968. R.0069. On January 26, 1968, judgment of conviction on the guilty verdict was entered against petitioner. Petitioner

gave timely notice of his appeal from his conviction and sentence, and this appeal is still pending in the court below.[2]

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

On December 14, 1968, petitioner, through his retained counsel, filed a motion to recall the remittitur of January 15, 1968 so that the state's appeal would be heard properly upon briefs and with counsel to assist petitioner. R.0091; appendix, page A-12, below. This motion was made immediately petitioner had retained counsel prepared to represent his interests. The motion to recall remittitur is apparently the only procedure recognized in Washington state practice by which the Supreme Court, upon being advised of jurisdictional, clerical, or other errors or deficiencies in a judgment already transmitted to the Superior Court may correct its judgment or decision. *Mathison v. Anderson,* 107 Wash. 617, 182 Pac. 622; *State ex rel. Phoenix Etc. Ins. Co. v. Superior Court,* 146 Wash. 679, 264 Pac. 988. See *Kosten v. Fleming,* 17 Wn.2d 500, 136 P.2d 449. The sole basis of this motion was that petitioner had been denied the assistance of counsel on the state's successful appeal to reverse the trial court's order setting aside the verdict of guilty against petitioner.

After hearing oral argument on this point the court below denied the petitioner's motion to recall the remit-

2. The appeal from the judgment of conviction entered on the reinstated verdict is not directly before the court on this petition, although if the remittitur is recalled, as petitioner asserts it must be, the conviction would necessarily be set aside while the court below *reconsiders* the state's appeal from the trial court judgment setting aside the guilty verdict.

titur on the day of the argument, March 14, 1960. R.0091. On April 7, 1969, petitioner filed a petition for rehearing of the motion. There is, however, no provision under Rule 50, Rules on Appeal, for rehearing of a *motion*. This petition was never acted upon by the court below. Hence, this petition for certiorari is directed to the order of March 14, 1969.

REASONS FOR GRANTING THE WRIT

Petitioner had counsel at trial, but on the state's appeal he was without funds to retain an attorney and except for appointment of counsel at the state's expense would be unrepresented on the appeal from the order entered in his favor by the court below. The withdrawal of appointed counsel seems clearly to have deprived him of the effective assistance of counsel required by the Sixth and Fourteenth Amendments.

The right of an accused to the effective assistance of counsel at every phase of his confrontation with the law in a criminal case is fundamental to due process. He is entitled to counsel at his trial, *Gideon v. Wainwright*, 372 U.S. 335; in pre-trial proceedings, *Escobedo v. Illinois*, 378 U.S. 478; *Miranda v. Arizona*, 384 U.S. 436, on appeal, *Anders v. California*, 386 U.S. 738; *Entsminger v. Iowa*, 386 U.S. 748; and in post conviction proceedings for revocation of parole, *Mempa v. Rhay*, 389 U.S. 128. Obviously, the effective assistance of counsel is especially important in a case such as this where the indigent defendant has been successfully represented by able counsel at his trial, and the State appeals from an order entered setting aside a verdict of guilty. If he is deprived of as-

sistance of counsel on the appeal, his effective representation at the trial court level avails him nothing.

The decision of the court below denying petitioner's motion to recall the remittitur appears to be in direct conflict with *Anders* and *Entsminger* just cited above, where this court laid down procedures for the withdrawal of counsel consistent with due process and equal protection. Neither these nor any other appropriate procedures were followed in this case to assure a representation of petitioner's interests on the state's appeal.

The role of appointed counsel as an advocate required him to support his client's cause to the best of his ability. Indeed, appointed counsel's reason for withdrawing, as stated to the court, Appendix E below, that is his asserted inability to reach his client to confer with him, would appear to be high frivolous. The issues on the appeal were questions of law, matters upon which the appointed counsel, who was being paid by the state, and who was furnished at state expense a transcript of the record, could receive little if any assistance from his client, the merits of whose cause had already been attested to by the trial judge in setting aside he verdict of guilty.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted, the order of March 14, 1969, should be summarily set aside and the case remanded to the Supreme Court of the State of Washington with instructions to recall the remittitur and to grant a rehearing of the appeal of the state from the order setting

aside the guilty verdict, with provision for effective assistance of counsel for petitioner on this appeal.

Respectfully submitted,

JOHN CAUGHLAN
Attorney for Petitioner
IRVING C. PAUL
ROGER W. JOHNSON
Of Counsel

APPENDIX A

Opinion of the Washington State Supreme Court, *State v. Collins*, 72 Wn.2d 741, 435 P.2d 538, decided December 14, 1967.

The State of Washington, *Appellant*,

v.

Bishop Collins, *Respondent*.

Appeal from an order of the Superior Court for King County, No. 44665, Lloyd Shorett, J., entered November 18, 1966. *Reversed*.

Prosecution for burglary. The state appeals from an order granting the defendant a new trial after a verdict of guilty.

Charles O. Carroll, John S. Ludwigson, and *Thomas Wampold,* for appellant.

HUNTER, J.—This is an appeal by the state of Washington from an order of the Superior Court for King County, granting a new trial to defendant (respondent) Bishop Collins after a jury had convicted him of second-degree burglary. The record shows the following:

Michael D. Ebben was awakened by a noise in his Seattle apartment about 3 o'clock on the morning of June 17, 1966. He heard the door slam and when he looked in his trousers for his wallet, which had contained one $20 bill and seven $1 bills, he discovered that it was missing. Ebben awakened his roommates, Carl Stewart and David Nygren, who quickly dressed and went outside. While still in the hallway, they observed a male person wearing "baggy pants" walking in the street in front of the apartment. Once outside they saw a person wearing "baggy pants" walking in a northerly direction

on 12th Avenue N.E. They then lost sight of this individual but shortly thereafter saw a person walking in the same direction in an alley paralleling 12th Avenue N.E. They made their way between two buildings to the alley and found the defendant in custody of two police officers. A search of the area disclosed Ebben's empty wallet in a rockery located between his apartment and the place where the defendant had been apprehended.

Mrs. Elizabeth Wiesen, who lives across the alley from the Ebben apartment, testified that she was awakened by a prowler in her apartment about 3 o'clock the same morning; and that she observed a man wearing a sweater and "baggy gray slacks" fleeing out the door. She reported this to the police. The officers who arrested the defendant in the alley had responded to Mrs. Wiesen's report.

When the defendant was searched, he was found in possession of $32, in denominations of seven $1 bills, one $5 bill, and one $20 bill. Witnesses testified that he was wearing dark colored baggy slacks, and a cardigan sweater over a gray sweatshirt.

The defendant, a Negro, told the arresting officers his car was stuck in the alley and he had a friend in the area he was attempting to locate to assist him. He said that two white men were chasing him, which was the reason he was running. The defendant did not name or give the address of his friend. The defendant repeated this story at the trial.

The defendant was charged by information with burglary on two counts: (1) for entering the dwelling of Elizabeth Wiesen with intent to commit a crime, and

(2) for entering the dwelling of Michael D. Ebben with intent to commit a crime. Count 1 was dismissed by the trial court for insufficient evidence at the conclusion of the state's case. The jury returned a verdict of guilty on count 2.

The trial court granted defendant's motion for a new trial on two grounds: (1) that it erred in failing to give defendant's Instruction No. 1, *infra*, and (2) that the verdict denied the defendant substantial justice. The trial court concluded that under the case of *State v. Mevis*, 53 Wn.2d 377, 333 P.2d 1095 (1959), it had no alternative but to give the defendant's proposed Instruction No. 1. We disagree. The instruction as proposed reads as follows:

> Where a person is accused of burglary, proof of recent possession of the property alleged to have been stolen from the premises is not of itself sufficient to justify a conviction of burglary. Therefore, you must find beyond a reasonable doubt that the property, if any, in possession of the defendant was the same property allegedly stolen in the burglary. Then and only then may you consider proof of recent possession of the property alleged to have been stolen as evidence of participation in the burglary alleged. Even if you do consider the evidence, the defendant's possession of this property is not alone sufficient to warrant you in finding him guilty, but is merely a circumstance which may be taken in connection with all the other facts and circumstances in the case in arriving at your verdict.

Under *Mevis, supra*, the jury is entitled to know that no inference can be drawn from the evidence of property in the possession of the defendant unless the jury finds it to be recently stolen property, and that in any event such possession cannot constitute the whole case against the

defendant. However, the instruction as drawn is erroneous. It is objectionable, first, because it unduly emphasizes consideration of certain items of evidence in the case. As proposed, it requires that the jury, *must* find, beyond a reasonable doubt, that the property in defendant's possession was stolen, and that *then and only then,* can this property be considered as evidence of the defendant's guilt, along with the other evidence. There is a danger, inherent in the instruction, that the jury may be misled into thinking that if it finds that the property was not stolen, this determination is more significant than the consideration of other evidence in determining the ultimate guilt or innocence of the defentant. Also, the instruction repeats the injunction that proof of possession of recently stolen property is not alone enough to convict the defendant of burglary, thereby unfairly overemphasizing this admonition. Moreover, the instruction fails to state that defendant's possession of recently stolen property may be proven by either direct or circumstantial evidence as required in *Mevis, supra,* p. 382. It is the cumulative effect of the foregoing which renders the instruction erroneous. We have often said that an instruction erroneously drawn need not be given. *Adams v. State,* 71 Wn.2d 414, 429 P.2d 109 (1967); *Vogel v. Alaska S.S. Co.,* 69 Wn.2d 497, 419 P.2d 141 (1966). The court in its oral opinion concedes that the proposed instruction would require rewording before it could be given. The failure to give this instruction as proposed was not error, and therefore cannot constitute a ground for granting the defendant a new trial.

The trial court's second ground, that substantial justice had not been done, is unsupported, except for what ap-

pears in the oral opinion, by reasons of fact or law as required by Rule of Pleading, Practice and Procedure 59.04W, R.C.W. vol. 0, now Civil Rule for Superior Court 59(a)(f). Absent such reasons, we will not sustain the granting of the motion. *Johnson v. Department of Labor & Indus.*, 46 Wn.2d 463, 466, 281 P.2d 994 (1955). It appears from the oral opinion that the sole basis for granting the motion for new trial on the ground that substantial justice had not been done was that the court disagreed with the jury's verdict on the evidence. This is not a ground for awarding a new trial, and we will uphold the verdict if we find, as we do in this case, that it is supported by substantial evidence. *Bunnell v. Barr*, 68 Wn.2d 771, 415 P.2d 640 (1966); *Knecht v. Marzano*, 65 Wn.2d 290, 396 P.2d 782 (1964).

The order granting a new trial is reversed, and the cause is remanded for reinstatement of the jury verdict.

FINLEY, C. J., DONWORTH and NEILL, JJ., and WARD, J. Pro Tem., concur.

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* v. BISHOP COLLINS, *Defendant.*	No. 44665 ORDER GRANTING NEW TRIAL

THIS MATTER having come on duly and regularly before the undersigned judge of the above-entitled court upon the motion of the defendant, Bishop Collins, by and through his attorneys, Edmund J. Wood and Walter T. Greenaway, and argument having been heard upon the matter on October 14, 1966 and again on November 2, 1966, and the court being familiar with the records and files herein, and being fully advised in the premises,

NOW THEREFORE,

IT IS HEREBY ORDERED that a new trial be granted in the above-entitled cause for the following reasons:

1. The court erroneously refused to give defendant's proposed instruction relating to circumstantial evidence and proof of possession of recently stolen property, said instruction reading as follows:

> Where a person is accused of burglary, proof of recent possession of the property alleged to have been stolen from the premises is not of itself sufficient to justify a conviction of burglary. Therefore, you must find beyond a reasonable doubt that the

property, if any, in possession of the defendant was the same property allegedly stolen in the burglary. Then and only then may you consider proof of recent possession of the property alleged to have been stolen as evidence of participation in the burglary alleged. Even if you do consider the evidence, the defendant's possession of this property is not alone sufficient to warrant you in finding him guilty, but is merely a circumstance which may be taken in connection with all other facts and circumstances in the case in arriving at your verdict.

2. The court felt additionally that substantial justice was not done in considering the evidence produced in the case.

DONE IN OPEN COURT THIS 18th day of November, 1966.

s/LLOYD SHORETT
Judge

Presented by:
Deputy Prosecuting Attorney
s/JOHN S. LUDWIGRON
Approved for Entry:
s/WALTER T. GREENAWAY
Attorney for Defendant

APPENDIX C

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, *Plaintiff,* v. BISHOP COLLINS, *Defendant.*	No. 44665 Order Appointing Counsel for Defendant on appeal

The defendant in this cause having appeared in open court to request the appointment of counsel to represent him herein and the defendant having been interrogated by the court and having been found to be without means with which to employ counsel and being desirous of having such representation, now, therefore,

IT IS ORDERED that WALTER T. GREENAWAY, a member of the bar, be and he is designated and appointed as attorney for the above-named defendant on appeal and to represent him throughout these proceedings until relieved pursuant to Rule 66 of the Special Rules of the Superior Court for this county.

DONE IN OPEN COURT this 17th day of August 1967.

s/H. C. AGNEW
Presiding Judge

Copy mailed to
Appointed Counsel

APPENDIX D

October 23, 1967

Mr. Walter T. Greenaway
Attorney at Law
620 Arctic Building
Seattle, Washington

Dear Mr. Greenaway:

Re: No. 39303—State v. Collins

Reference is made to your telephone conversation in which you stated that although you are court appointed counsel for the defendant/respondent, you do not intend to file a brief on his behalf since you are unable to locate the defendant and have no means of finding him.

The Chief Justice has approved your intentions provided that you file an affidavit setting forth that you have made diligent effort to locate the defendant including inquiries of the bondsman, if the defendant posted bond; the sheriff; relatives, if known; etc. and that these efforts have not been successful.

Very truly yours,
William M. Lowry
Clerk

WML:mas
cc: Honorable Charles O. Carroll

APPENDIX E

AFFIDAVIT

STATE OF WASHINGTON }
COUNTY OF KING } ss.

WALTER T. GREENAWAY, being first duly sworn on oath, deposes and says:

That I was on separate occasions both retained and Court appointed attorney for Bishop Collins in the criminal matter filed and heard in the Superior Court of King County, and subsequently brought before the Supreme Court on appeal.

At no time during the attempted representation was I able to obtain any cooperation from Mr. Collins. Affiant on numerous occasions attempted unsuccessfully by telephone and letter to contact Mr. Collins relative to the matter on appeal. More specifically, my office records reflect unsuccessful attempts to contact Mr. Collins during 1967 in the months of March, May, June, July and August. My records also reflect two broken office appointments on June 5, 1967 and July 10, 1967. My records further reflect that I conferred with the Prosecuting Attorney on August 9, 1967 in an unsuccessful attempt to locate Mr. Collins.

Affiant also related this information to the Court at Olympia by telephone call on July 20, 1967. Subsequent to said telephone call I did indicate my withdrawal from the case because of my inability to maintain any contact whatsoever with my supposed client.

Affiant states that he was unable for the above reasons

to represent Mr. Collins adequately, and based on said reasons did in fact withdraw from the case.

s/WALTER T. GREENAWAY

SUBSCRIBED AND SWORN TO before me this 20th day of February, 1969.

s/JUDITH ANN LIBBY

Notary Public in and for the State of Washington, residing at Seattle

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Appellant,* v. BISHOP COLLINS, *Respondent.*	No. 39303 Motion and Affidavit for Order Recalling Remittitur

COMES NOW the respondent, Bishop Collins, by and through his attorney, Irving C. Paul, Jr., and moves the Court for an Order herein recalling the Remittitur heretofore issued herein. The basis for this Motion is that appointed counsel for respondent in regard to this appeal failed to file a brief herein and failed to argue the matter before this Court. This motion is further based upon the record and file herein and the Affidavit below following.

s/IRVING C. PAUL
Attorney for Respondent

STATE OF WASHINGTON }
COUNTY OF KING } ss.

BISHOP COLLINS, being first duly sworn upon oath deposes and says: That he was convicted of the crime of burglary in the Second Degree in King County on September 27, 1966. On November 18, 1966 the trial court entered an Order granting respondent a new trial. Walter T. Greenaway had been appointed by the Superior Court of the State of Washington for the purpose of handling all matters in regard to an appeal. Affiant states and believes that he was advised that Mr. Walter T. Greenaway would represent the interest of respondent in re-

gard to the appeal taken by the State of Washington from Judge Shorett's order granting a new trial.

That at all times affiant was ready, willing and able to confer with Walter T. Greenaway in regard to matters relating to the appeal of the State of Washington. In any case the matters presented by the said appeal by the State of Washington presented questions of fact and law in the record and that cooperation of respondent, Bishop Collins, was not necessary in order that the said Mr. Greenaway properly present the matter to the Supreme Court.

s/BISHOP COLLINS

SUBSCRIBED AND SWORN to before me this 13th day of December, 1968.

s/JANET L. BARR
Notary Public in and for the State
of Washington, residing at Seattle